

STATE OF MICHIGAN
COURT OF APPEALS

BRAD WILLIAMS,

Plaintiff-Appellant,

v

BOLDON'S BODY SHOP LLC,

Defendant-Appellee.

UNPUBLISHED

June 5, 2007

No. 265901

Lenawee Circuit Court

LC No. 04-041484-CZ

BRAD WILLIAMS,

Plaintiff-Appellant,

v

BOLDON'S BODY SHOP LLC,

Defendant-Appellee.

No. 269022

Lenawee Circuit Court

LC No. 04-041484-CZ

Before: Meter, P.J., and Kelly and Fort Hood, J.J.

PER CURIAM.

In this action brought pursuant to the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq.*, plaintiff appeals as of right the trial court's order granting defendant's motions for directed verdict and/or judgment notwithstanding the verdict (JNOV) and its order assessing case evaluation sanctions against plaintiff. We vacate the trial court's order granting directed verdict and/or JNOV and its order assessing case evaluation sanctions against plaintiff and reinstate the judgment entered in plaintiff's favor according to the jury verdict.

I. JNOV/Directed Verdict

Plaintiff contends that the trial court erred in granting defendant's motions for directed verdict and JNOV, which the trial court considered together after the jury verdict was rendered and granted in the alternative. We address each motion in turn starting with the directed verdict motion, which defendant raised immediately following plaintiff's proofs.

A. Directed Verdict

We review de novo the trial court's decision on a motion for a directed verdict. *Zantel Marketing Agency v Whitesell Corp*, 265 Mich App 559, 568; 696 NW2d 735 (2005). A directed verdict is appropriate only when no factual question exists on which reasonable jurors could differ. *Cacevic v Simplimatic Engineering Co (On Remand)*, 248 Mich App 670, 679-680; 645 NW2d 287 (2001). The appellate court reviews all the evidence presented up to the time of the directed verdict motion, considers that evidence in a light most favorable to the nonmoving party, and determines whether a question of fact existed. *Id.* at 679. "An appellate court recognizes the jury's and the judge's unique opportunity to observe the witnesses, as well as the factfinder's responsibility to determine the credibility and weight of the trial testimony." *Zeeland Farm Servs, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 195; 555 NW2d 733 (1996).

When considering claims under the WPA, this Court applies the burden-shifting analysis used in retaliatory discharge claims under the Civil Rights Act, MCL 37.2101 *et seq.* *Roulston v Tendercare (Michigan), Inc*, 239 Mich App 270, 280-281; 608 NW2d 525 (2000). If the plaintiff has successfully proved a prima facie case under the WPA, the burden shifts to the defendant to articulate a legitimate business reason for the plaintiff's discharge. *Id.* at 281. If the defendant produces evidence establishing the existence of a legitimate reason for the discharge, the plaintiff then has the opportunity to prove that the legitimate reason offered by the defendant was not the true reason, but was only a pretext. *Id.*

There are three elements to a prima facie case under the WPA: "(1) that plaintiff was engaged in protected activities as defined by the act; (2) that plaintiff was subsequently discharged, threatened, or otherwise discriminated against; and (3) that a causal connection existed between the protected activity and the discharge, threat, or discrimination." *Brown v Mayor of Detroit*, 271 Mich App 692, 706; 723 NW2d 464 (2006) (punctuation and citations omitted).

With regard to the first element, "protected activity" refers to (1) reporting to a public body a violation of a law, regulation or rule, (2) being about to report such a violation to a public body, or (3) being asked by a public body to participate in an investigation. MCL 15.362. The WPA protects employees who make a report or are about to make a report of "suspected violations of law . . . unless the employee knows that the report is false." *Id.*

In this case, defendant argues and the trial court concluded that there was no evidence that plaintiff reasonably believed that defendant's painting and priming procedures violated the Michigan Occupational Safety and Health Act (MIOSHA), MCL 408.2001 *et seq.* The trial court noted that plaintiff never researched any law or consulted a governmental agency to determine whether there was an actual violation. The trial court also noted evidence that other body shops in the area painted and primed in the open shop. In addition to this evidence, however, there was other evidence demonstrating that plaintiff believed defendant was violating MIOSHA and that his belief was reasonable.

Plaintiff testified that he believed spraying outside the prep deck or paint booth was a MIOSHA violation because he attended a training class at Boldon's Body Shop. According to plaintiff, the training informed employees that paint and primer fumes are hazardous and

painting and priming should be done in the paint booth and prep deck. As for the reasonableness of plaintiff's belief, Todd Strong, a representative from the Michigan Occupational Safety and Health Administration (the MIOSHA), testified that he inspected defendant on the basis of plaintiff's complaint. And although he did not detect a violation, he believed that it was reasonable for plaintiff to have reported a MIOSHA violation.

Defendant also argues and the trial court concluded that there was no evidence that plaintiff was "about to" report a violation. According to *Shallal v Catholic Social Services of Wayne County*, 455 Mich 604, 611; 566 NW2d 571 (1997), a plaintiff must establish by clear and convincing evidence that he was about to report a violation. But "[a] plaintiff should not be required to say 'magic words' in order to reap the protections of the statute. It should be sufficient that plaintiff actually threatened to report her employer." *Id.* at 616.

Although plaintiff's proofs demonstrated that he had complained about paint fumes for a number of years, plaintiff also presented the testimony of defendant's manager Scott Sword, who stated that plaintiff's complaints increased over time. Sword also testified that late October or early November of 2003, plaintiff told Sword that he was going to make a report to the MIOSHA. At that time, Sword informed Robert Boldon, defendant's owner, of plaintiff's plans. Plaintiff also demonstrated that in December 2003, he took photographs showing that painting and priming were being performed in the open shop. And on December 5, 2003, plaintiff argued with Norman Kope about priming a vehicle there. Plaintiff told Kope that he intended to take photographs to the MIOSHA. According to plaintiff, when he spoke to Vickie Boldon, defendant's co-owner, about the matter, she indicated that she understood plaintiff would be taking the photographs to the MIOSHA. Kope offered similar testimony that on the Friday before plaintiff was discharged, plaintiff told Kope that he had taken photographs and was going to the MIOSHA. Kope also told Vickie Boldon that plaintiff intended to call the MIOSHA. Based on the evidence presented up to the time of defendant's directed verdict motion, we conclude there was a question of fact about whether plaintiff had threatened to report a MIOSHA violation.

As for the second element, there is no dispute about whether plaintiff was discharged; the only dispute regards the third element, i.e., whether there was a causal connection between plaintiff's protected activity and his discharge. The trial court concluded that plaintiff never discussed his MIOSHA claim with defendant's owners and that defendant fired plaintiff because of his "verbal assault" on Vickie Boldon. However, we have reviewed plaintiff's proofs and discern a question of fact on this element.

Plaintiff testified that after he was discharged, when he asked Robert Boldon why a vehicle had been moved to a designated area for priming, Boldon responded that he understood plaintiff had taken photographs and intended to take them to the MIOSHA. Further, plaintiff testified that Robert Boldon told him, "[Y]ou also have a business and what comes around goes around." Additionally, Kope testified that on the Friday before plaintiff was discharged, plaintiff told Kope that he had taken photographs and was going to the MIOSHA. Kope reported this to Vickie Boldon. Kope testified that he believed Robert Boldon subsequently asked the painters to use the prep deck more frequently because he thought the MIOSHA was coming. Scott Sword also testified that in late October or early November of 2003, plaintiff told Sword that he was going to make a report to the MIOSHA. At that time, Sword informed Robert Boldon of plaintiff's threat. Thus, there was evidence that plaintiff informed defendant's owners of his

intention to contact the MIOSHA, even if he did not do so directly. This evidence supports an inference that defendant fired plaintiff because he had threatened to report a MIOSHA violation.

While there was also evidence that plaintiff had had an argument or altercation with Vickie Boldon, there were significant factual disputes about the incident. According to plaintiff, he had an argument with Kope about painting and threatened to call the MIOSHA. Afterward, Kope went to Vickie Boldon's office to discuss this. Plaintiff went to the office as well, and admitted that he was upset, but asserted that he did not yell. Kope also testified that plaintiff did not yell.

Thus, while the jury could have concluded that plaintiff was discharged because of his behavior toward Vickie Boldon, the evidence also supports an inference that that reason was merely a pretext. Based on plaintiff's proofs, we conclude that plaintiff presented sufficient evidence to create a question of fact as to whether defendant discharged plaintiff because he threatened to report a MIOSHA violation.

The trial court erred in granting defendant's motion for directed verdict because viewing the evidence in the light most favorable to the nonmoving party, questions of fact existed on whether plaintiff proved a prima facie case under the WPA and whether defendant's stated reason for discharging plaintiff was a mere pretext.¹

B. JNOV

We next consider whether the trial court erred in granting defendant's motion for JNOV. This Court also reviews de novo a trial court's decision regarding a motion for JNOV. *Zantell*, *supra* at 568. A motion for JNOV should be granted only when there is insufficient evidence presented to create an issue for the jury. *Merkur Steel Supply, Inc v Detroit*, 261 Mich App 116, 123; 680 NW2d 485 (2004). When deciding a motion for JNOV, the trial court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party and determine whether the facts presented preclude judgment for the nonmoving party as a matter of law. *Id.* at 123-124. "When the evidence presented could lead reasonable jurors to disagree, the trial court may not substitute its judgment for that of the jury." *Foreman v Foreman*, 266 Mich App 132, 136; 701 NW2d 167 (2005).

¹ Plaintiff also argues that the trial court's order granting directed verdict and/or JNOV should be reversed because, in arguing the motion, defendant did not refer to the trial transcripts or provide the trial court with a copy of the transcripts. However, plaintiff only relies on an unpublished opinion of this Court, in which a trial judge who had not presided over the trial granted a motion for new trial despite not having reviewed to entire record. *Lasher v Wright*, unpublished opinion per curiam of the Court of Appeals, issued May 17, 2005 (Docket No. 250954). In this case, the judge who granted defendant's motion presided over the entire trial and was familiar with the record. Accordingly, we conclude that this argument is without merit.

With regard to the first element, as discussed above, plaintiff presented evidence that he was about to report an alleged violation and that his belief that there was a violation was reasonable. The evidence defendant offered that there was no violation, that other shops in the area also painted and primed in the open shop, and that plaintiff had complained about paint fumes for years did not eliminate this question of fact.

The second element was not disputed. With regard to the third element, defendant's proofs at most give rise to questions of fact. Although Robert Boldon testified at trial that he fired plaintiff for the way he acted toward other employees and toward Vickie Boldon, there was evidence that Robert Boldon told plaintiff, "You've got a business too. Why don't you think about that?" At trial, Robert Boldon explained, "I told [plaintiff] I didn't appreciate him verbally abusing my wife, and I told him I didn't appreciate him threatening Scott Sword with his MIOSHA claim or pictures or whatever he intended to do." Robert Boldon was also asked:

Q. But my question, sir, is when you made that statement, you thought your business was being threatened by Mr. Williams, didn't you?

And he responded,

A. Nobody wants a governmental agency in their business if they don't need it.

This testimony allows for a reasonable inference that defendant knew that plaintiff intended to report a MIOSHA violation and discharged him for that reason. Viewing all the record evidence in the light most favorable to the nonmoving party, we conclude that reasonable jurors could have disagreed about whether plaintiff's discharge was causally related to plaintiff's protected activity.

In their motion for JNOV, defendant also argued that plaintiff failed to mitigate his damages. The trial court determined that "[t]here is not a shred of evidence that Plaintiff diligently or reasonably sought to mitigate his damages by seeking employment or otherwise." Generally, "the question whether an employee was reasonable in not seeking or accepting particular employment is one to be decided by the trier of fact." *Rasheed v Chrysler Corp*, 445 Mich 109, 124; 517 NW2d 19 (1994). The defendant has the burden of proving that the plaintiff failed to make reasonable efforts to mitigate damages. *Id.*

As the trial court noted, plaintiff testified that he applied for work at other body shops, but did not receive any other offers of employment. Plaintiff testified that he applied at Adrian Dodge, Dave Knapp, Scotty's Body Shop, Cliff Pontiac, and Haller Appraisal. Plaintiff also testified that he sought work as an insurance adjuster and tried to build up his at-home taxidermy business. On cross-examination, defense counsel questioned plaintiff about his deposition testimony, in which he stated that he had not applied anywhere other than Adrian Dodge. There was also testimony that plaintiff turned down a position at Scotty's because it offered significantly lower pay and plaintiff was concerned about the working conditions at the shop.

The trial court erred in ruling that plaintiff failed to present a "shred" of evidence that he made reasonable attempts to mitigate his damages. Although plaintiff's testimony was impeached with his deposition testimony, it was not entirely negated and the jury should have been allowed to determine the weight and credibility of plaintiff's testimony. Additionally,

Robert Boldon testified that he told three other body shops in the area that plaintiff reported his shop to the MIOSHA and filed a lawsuit against him. The jury might have considered this in determining whether plaintiff's efforts were reasonable.²

After reviewing the entire record, we conclude that there were questions of fact for the jury. Because the evidence was such that reasonable jurors could disagree, the trial court improperly granted defendant's motion for JNOV.

II. Instruction on Future Damages

Plaintiff also contends that the trial court erred in ruling that plaintiff was not entitled to future damages and not submitting the question of future damages to the jury. Plaintiff contends that he is consequently entitled to a new trial on damages. We disagree.

On the second day of trial, *after both sides rested*, the trial court heard argument on whether it should provide an instruction on future damages. After both sides presented their arguments, the trial court ruled,

I think that there is no evidence of future damages as far as wages is concerned, and I don't think there's any – I just don't think I can let that go to the jury, any more than I could let it go to the jury as to any other item of future damages. I will not give the instruction as to future damages or the verdict form including future damages.

Nonetheless, after both sides presented their closing arguments, the trial court provided the following instructions to the jury:

You should also include each of the following elements of damage which you decide Plaintiff is reasonably certain to sustain in the future: loss of wages and earnings, loss of benefits, mental anguish and emotional distress, humiliation, outrage, and embarrassment.

If any element of damage is of a continuing nature, you shall decide how long it may continue. If an element of damage is permanent in nature, then you

² Plaintiff also asserts that he presented sufficient evidence of his damages at trial. But other than its ruling that plaintiff failed to demonstrate that he mitigated his damages, the trial court did not rule that plaintiff failed to demonstrate that he any suffered damages. In its opinion, the trial court stated, "He made no reasonable effort to mitigate his damages. This precludes his claim for lost wages. If the Plaintiff had prevailed on the other issues, he would be entitled to a new trial on the sole issue of his damages for embarrassment, mental anguish, etc, which damages are comparatively minimal." Thus, because the trial court did not rule that plaintiff failed to prove any damages, this issue is not preserved for appeal. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999).

shall decide how long the Plaintiff is likely to live. Which, if any, of these elements has been proved is for you to decide based upon evidence and not upon speculation or conjecture.

Plaintiff contends that, because of the trial court's ruling, he was not allowed to argue future damages in closing. However, because the trial court did not rule on this matter until both sides rested, plaintiff was allowed to present all of his evidence on damages, including the evidence he believed demonstrated future damages. Furthermore, the verdict form did not provide a breakdown of past, present and future damages. Therefore, it is impossible for this Court to determine whether the jury awarded future damages or not. As such, we cannot conclude that plaintiff is entitled to a new trial on damages.

III. Case Evaluation Sanctions

Plaintiff also contends that the trial court erred in assessing case evaluation sanctions against plaintiff. A trial court's decision to grant or deny case evaluation sanctions is subject to review de novo on appeal. *Elia v Hazen*, 242 Mich App 374, 376-377; 619 NW2d 1 (2000).

According to MCR 2.403(O)(1), "If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation." For purposes of this court rule, a "verdict" includes "a judgment entered as a result of a ruling on a motion after rejection of the case evaluation." MCR 2.403(O)(2)(c).

Accordingly, because we conclude that the trial court erred in granting defendant's motion for directed verdict and/or JNOV, we vacate the trial court's order assessing case evaluation sanctions against plaintiff because the jury verdict of \$80,000 was more favorable to plaintiff than the case evaluation of \$15,000.

We vacate the trial court's order granting directed verdict and/or JNOV and its order assessing case evaluation sanctions against plaintiff and reinstate the judgment entered in plaintiff's favor according to the jury verdict.

/s/ Patrick M. Meter
/s/ Kirsten Frank Kelly
/s/ Karen Fort Hood